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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA

Petitioner

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, and as Liquidator of the Domesticated United States Branch of the First Russian Insurance Company, Established in 1827; VICTOR YERMALOFF, and others

On Writ of Certiorari to the Supreme Court of the State of New York, New York County

**BRIEF ON BEHALF OF VICTOR YERMALOFF
AND OTHERS, CREDITORS**

CARL S. STERN

Counsel for Victor Yermaloff
and others, Amicus Curiae

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On Writ of Certiorari to the Supreme Court of the State of New York, New York County

BRIEF ON BEHALF OF VICTOR YERMALOFF AND OTHERS, CREDITORS

With the consent of the Solicitor General and the Attorney for the Superintendent of Insurance of the State of New York, this brief is filed on behalf of Victor Yermaloff, and others, defendants in this action, creditors of the First Russian Insurance Company,¹ whose claims have been

¹This group of creditors is described in the complaint as represented by Messrs. Engelhard, Pollak, Pitcher & Stern (R. 20).

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allowed—many of them paid^o in part—in the proceeding brought for the liquidation of the domesticated United States branch of that company.

The creditors of the Insurance Company, though defendants, are not parties to the present appeal. For it was upon the motion of the Superintendent of Insurance alone that the judgment of dismissal here under review was obtained. The creditors, however, though not parties *pro forma*, are the persons whose rights and interests are really at stake here, for this appeal is holding up the payment of their allowed claims.

Statement of the Case

In 1925, in proceedings then begun for the liquidation of the United States branch of the Insurance Company, the Superintendent of Insurance of the State of New York took over its properties as liquidator. The cash and securities here involved were among the properties of that branch. In 1931, after the payment of the branch creditors and of the attachment lien creditors (R. 28-29) the New York Court of Appeals directed that all claims filed, whether by foreign or domestic creditors and which were then or thereafter found to be valid, should be paid.

The order and interlocutory judgment entered on the remittitur from the Court of Appeals (June 16, 1931; re-settled July 13, 1931) required that a "Reserve Fund for Filed Claims" should be set up sufficient to cover payment of the filed claims.² This reserve was expressly exempted from attachment or execution. After the setting up of this reserve and a further reserve for expenses of liquidation and taxes, the balance remaining was (1) for a period of four months to be subject to attachment by those creditors who had not theretofore filed their claims, and

²These creditors whom we represent were among those who had already filed their claims.

(2) any surplus thereafter was to go to a quorum of directors as representing the Company for the benefit of the stockholders.³

(There will be no surplus for shareholders. As explained in the Superintendent's brief, the surplus on hand will be exhausted by the allowed claims of creditors. See also complaint, par. 17 [R. 86-7].)

After the entry of the 1931 decree, the Superintendent of Insurance proceeded to take proof of claims, make evaluations and compute interest. His fourth and latest report, dated November 9, 1933 (R. 32), was confirmed by the New York Supreme Court on December 13, 1933 and the claims thus allowed were then paid as to principal (R. 32).

On November 16, 1933—over two years after the entry of the order and interlocutory judgment on remittitur and a week after the Superintendent's November 9, 1933 report working out the details was filed (R. 30-33)—the Soviet government was recognized and the Litvinov assignment made and accepted (R. 31).

A referee's report recommending allowance of some additional claims, and interest on all claims allowed, was confirmed by order of March 30, 1936; the Appellate Division of the New York Supreme Court affirmed on February 26, 1937 and the Court of Appeals on May 25, 1937 (R. 34, 35; *Matter of People [First Russian Insurance Co.]*, 250 App. Div. 711, no opinion; 274 N. Y. 545, no opinion).

³The principles are laid down in the opinion of Cardozo, C. J., writing for the unanimous court. *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, 422-426. The order and judgment on remittitur is not printed in the record here. It appears at pages 37-42 of the record in *United States of America, petitioner, v. Louis H. Pink*, one of the three cases decided together, 296 U. S. 463. For the convenience of the Court it is reprinted in the Appendix, *infra*, pp. 23-30, see especially pp. 26-30.

Sixteen years ago the liquidation was started. Ten years ago the principles were laid down (255 N. Y. 415) applying the surplus funds held by the Superintendent to the payment of these creditors, all of whom had filed their claims prior to the entry of the order and judgment on remittitur in 1931. Only this appeal prevents the payment of the sums awarded and the completion of the liquidation, so far as these creditors are concerned (R. 42).

Argument

The principles applying here have all been settled in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624 (affirming 280 N. Y. 286), rehearing denied 309 U. S. 697. The New York Supreme Court properly refused to give effect to a foreign transfer of property within its jurisdiction and held subject to its disposal, to the extent of destroying the rights of creditors who had been invited to file their claims against this property in New York (First Point).

The Litvinov assignment, under which petitioner claims, created no overriding federal rights. It did not purport to impair, and under the Fifth Amendment could not impair the rights of the creditors before the New York courts (Second Point).

FIRST

The New York courts have acted in accordance with established New York and American doctrine in applying property within their custody to the payment of foreign creditors whose claims have been filed and adjudged valid in the liquidation proceeding under former § 63 of the New York Insurance Law.

A. Every question arising in this case was settled in *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624 (affirming 280 N. Y. 285), rehearing unanimously denied 309 U. S. 697.

The New York Court of Appeals, in rendering the judgment of affirmance that is here under review declared (R. 71-2; 284 N. Y. 555) that this case had already been determined in principle by its decision in the *Moscow* case (280 N. Y. 286) and the affirmance of that decision by this Court (309 U. S. 624).

How thoroughly the *Moscow* case covers the points at issue here is shown by the arguments of counsel for the Government:

Thus, in opposing the motion for the dismissal of the complaint here—made pursuant to Rule 113 of the New York Rules of Civil Practice, and § 476 of the New York Civil Practice Act—the sole ground of opposition urged by Government counsel was that the *Moscow* case had not yet been decided by this Court (see affidavit in opposition to motion, R. 51).

And the Government's brief is merely an attempt to reargue the *Moscow* case. A significant illustration is the plea that all that is sought by the Government now is a recognition that the rights of the Soviet Government (and of the United States as its assignee) with respect to the surplus funds of the United States Branch of the First Russian Insurance Company, were those of a statutory successor of the Russian corporation (Government's

brief, pp. 9, 19, 58). For in the *Moscow* case there was express recognition of that status—an express finding that “upon nationalization, the Government, under Soviet laws, becomes the statutory successor and domiciliary liquidator of the nationalized and dissolved Russian companies” (Record, 309 U. S. 624, p. 124, finding-77)⁴. The *Moscow* case was decided against the Government’s contentions, despite that finding.

The decisions of the New York courts in the *Moscow* case and in the present case of the First Russian Insurance Company, represent the application of the governing principles used by the New York Court of Appeals over a period of years in interpreting the duties of the Superintendent of Insurance under § 63 of the Insurance Law of 1909 (L. 1909, ch. 33, as amended L. 1912, ch. 217; L. 1918, ch. 119). The principles so established are consistent with the whole body of New York and American doctrine.⁵

B. The rules worked out by the New York Court of Appeals over a period of years and culminating in the *Moscow* case, represent a consistent body of doctrine recognized as appropriate by this Court with respect to creditors’ rights in the New York courts against property situated in New York.

(1) The rights of alien friends to have recourse to the New York courts on their contract claims has been recognized for many years. *Russian Republic v. Cibrario*, 235 N. Y. 255, 259; *Sliosberg v. New York Life Insurance Company*, 244 N. Y. 482, 492; *Disconto Gesellschaft v. Umbreit*, 208 U. S. 570, 578. When in our courts aliens

⁴This finding was stressed in the brief which the United States submitted in that case (Government brief in *Moscow* case, p. 150).

⁵Being the latest decisions of the highest state court, they would represent the state law on the subject even if they had been inconsistent with prior New York decisions. *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 541, 543; *Wichita Royalty Company v. City National Bank*, 306 U. S. 103, 109.

are entitled to the same protection as other creditors (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 491-2; *Hibernia Bank v. Lacombe*, 84 N. Y. 367, 385).

But for the liquidation proceeding, which provided a different mechanism, Yermaloff and other similarly situated creditors of the First Russian Insurance Company might have brought suit, attached, and been paid as was the creditor in *Murphy v. Second Russian Co.*, 240 N. Y. 554 (1925). Instead of attaching, these creditors, pursuant to invitation of the New York courts, filed their claims.⁶ As already stated, all those on whose behalf this brief is submitted had filed their claims prior to the entry of the order on remittitur.

(2) The property—out of which by the order of the Court a reserve fund was directed to be set up for the payment of those claims—consisted of cash deposited by the Superintendent in New York banks and securities in the Superintendent's possession, and was held by him subject to the direction of the New York Supreme Court. In 1931 the Court specifically directed the appropriation and setting aside of part of this property in a reserve for individuals who, pursuant to the invitation of the State, filed their claims. This proceeding was, as this Court has held,

⁶In the *Matter of People (First Russian Insurance Co.)*, 255 N. Y. 415, Cardozo, C. J., at 423 referred to those claimants (including the creditors whom we represent) whose proofs of claim had been "filed and diligently pressed." He said: "Creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts." Declaring that "there would be manifest inequity if at this late date an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew", he required that a reserve be set aside to take care of their claims, and it was only after the setting aside of that reserve that the remaining surplus was to go (a) to creditors who had not then filed, and, after all creditors, (b) to the representatives of the stockholders.

"essentially *in rem*" (*United States v. Bank of New York and Trust Co.*, 296 U. S. 463, 475-6).⁷

(3) As to the *res* in its custody for administration, the New York Supreme Court was within its powers and jurisdiction in refusing to allow a transfer of title under Russian decrees to defeat creditors whose right to payment out of this fund—provided their claims were found valid—had already been adjudged. The propriety of thus applying the funds has, as we show *infra*, been expressly recognized by this Court.

(a) After the payment of the branch and attachment creditors, the New York courts properly proceeded with the liquidation of the remaining assets for the benefit of all creditors regardless of the origin of their claims.

The principle established by the Court of Appeals prior to the *Moscow* case is that under former § 63^s of the New York Insurance Law the Superintendent of Insurance, as statutory liquidator of a domesticated branch of a foreign insurance company, took possession of the local assets not solely for the security of local policyholders and creditors "but for the interest of all its policyholders, creditors and stockholders wherever they may be". *Matter of People (City Equitable Fire Insurance Co.)*, 238 N. Y. 147, 156; *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148, 165.

⁷"The important matter", wrote Chase, C. J., for the Second Circuit Court of Appeals, in the opinion below (77 Fed. [2d] 866, 869), "is that before this action was commenced the fund in controversy had been taken into the custody of the New York court and has ever since remained in its custody. The sole purpose of the proceeding in the New York Court was to liquidate the fund and distribute it according to its laws. To that end, the state suit was *in rem*."

⁸Subdivisions 4 and 5 of former § 63, dealing with the liquidation of foreign insurance companies doing business in New York, are now replaced by §§ 514-516 of the New York Insurance Law of 1939 (L. 1939, Ch. 882), § 516 having been amended by L. 1940, Ch. 631, § 2.

In cases of insolvency where there is a home liquidator who will distribute for all creditors alike, this principle has impelled the New York courts to transmit to him—"on appropriate conditions"⁹—any surplus not needed for payment of claims arising out of United States business (*City Equitable* and *Norske Lloyd* cases, *supra*). But where there is no insolvency and no liquidator at the domicile who will make equitable distribution there, the same principle permits creditors, regardless of the origin of their claims, to secure payment here out of the surplus funds held here and may further require complete distribution here. *Matter of People* (*First Russian Insurance Co.*) and *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415, 423, 426.

The soundness of this procedure has been recognized by this Court. *Hughes, C. J.*, in an opinion dealing with *this company, these funds and these creditors* (296 U. S. 463 at p. 476)¹⁰ held that the New York court, after the payment of domestic creditors and policyholders "still had control of the property and necessarily had the pertinent equitable jurisdiction to decide what should be done with it. In such a case, the court might direct that the surplus assets should be remitted to a domiciliary receiver—if there were one—on appropriate conditions. *Matter of People* (*Norske Lloyd Ins. Co.*), 242 N. Y. 148. Or the court might direct further liquidation in order to provide for the payment of other claims, if that course appealed to the sense of equity in the particular circumstances", citing Judge

⁹296 U. S. at 476.

¹⁰The opinion is captioned *United States v. Bank of New York and Trust Co.*—the case dealing with the surplus funds of the Moscow company. The same opinion covers also the case of *United States v. Pink*, wherein the Government sought to get control of the surplus funds of the First Russian Company, as in the present case of *United States v. Pink*. Pages 475 and 486 of the opinion explain the special circumstances of the *First Russian* liquidation proceedings.

Cardozo's opinion in the two cases of *Matter of People (First Russian Insurance Co.)* and *Matter of People (Russian Reinsurance Co.)*, 255 N. Y. at 423.¹¹

Specifically, as Lehman, C. J., said in the *Moscow* case (280 N. Y. at 312): "No principle of law constrains us" to hold that "the suitors who at our invitation have come into court must be dismissed empty-handed; that we must remit the assets in our control to another sovereign to retain or distribute as it sees fit."

(b) In determining the rights of creditors, the Court in the *Moscow* decision¹² properly adopted the "recognized

¹¹The New York legislature has recently prescribed the same procedure wherever the United States branch of a foreign insurance company is in liquidation in New York. § 514, subd. 3 of the Insurance Law of 1939 now expressly provides that the liquidation of "the business of the United States Branch of an alien insurer having trustee assets in this state shall be in the same terms as those hereinbefore prescribed" (i. e., for the liquidation of domestic insurance companies), "except that only the assets of the business of such United States Branch shall be included therein."

¹²Judge Lehman pointed out that there were two questions involved: "first whether the Russian decrees were intended to have such (i. e., extraterritorial) effect, and, second, whether even if so intended the courts of this State will give them their intended effect" (280 N. Y. at 302).

The lower New York courts had found that the Russian decrees were not intended to reach out and affect the title to assets within the jurisdiction of the State of New York. Judge Lehman declared that these findings "rested upon a firm foundation" (280 N. Y. at 310).

But he also found that the second question as well as the first would have to be answered in the negative. At page 307 Judge Lehman said: "Certainly no decree monopolizing the business of insurance in Russia, taking over the conduct of the insurance business formerly conducted in Russia by insurance corporations, and terminating the obligations of such companies, could possibly have been intended to apply to business conducted here, or if so intended; could be binding here" (italics ours).

And his final declaration in affirming was (at 314): "The courts below have made the proper choice not because the enforcement of confiscatory decrees of property located elsewhere is contrary to our public policy, but because under the law of this State such confiscatory decrees do not affect the property claimed here" (italics ours).

rule that a state may rightly refuse to give effect to external transfers of property within its borders so far as they would operate to exclude creditors suing in its courts. *Harrison v. Sterry*, 5 Branch. 289; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624; *Clark v. Williard*, 294 U. S. 211; *Barth v. Backus*, 140 N. Y. 230" (*Stone, J.*, in the minority concurring opinion in *United States v. Belmont*, 301 U. S. 324, at 335).¹³

The New York courts allowed effect to the decrees of the Soviet government insofar as they terminated the existence of the insurance company in Russia (280 N. Y. at 310, 314). But even so, they properly refused to destroy the rights of creditors who had been invited to file their claims against the debtor's assets held in custody here in New York by according to the Soviet government, as successor, a prior right to take this fund.¹⁴

(c) If the Insurance Company itself had transferred its assets voluntarily to the Russian government, the transfer could not have disturbed the jurisdiction *in rem* of the New York courts to apply these funds to the payment of these creditors.

¹³This was also in line with the Court of Appeals' prior decisions (*James & Co. v. Second Russian Insurance Co.*, 239 N. Y. 248, 257 and *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. 369, 378).

¹⁴Apposite is the language of *Cardozo, J.*, in *James & Co. v. Second Russian Insurance Co.*, 239 N. Y. at 257:

"As to the Soviet decree, we think its attempted extinguishment of liabilities is *brutum fulmen*, in England as well as here, and this whether the government attempting it has been recognized or not. Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. Its fiat to that effect could not constrain the courts of other sovereignties, if assets of the debtor were available for seizure in the jurisdiction of the forum (*Barth v. Backus*, 140 N. Y. 230; *Matter of People [City Equitable Fire Ins. Co.]*, 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847)."

Nor could the Russian Government as statutory successor claim greater rights. For if the Russian Government were claiming the funds as statutory successor for the purpose of making equal distribution among creditors it would still be within the jurisdiction of the New York courts, with physical possession of the assets, to decide whether they should proceed with the liquidation or whether they should turn over the assets to the Russian government.

"In respect of his subjection to the power of the local law" the position of a statutory successor "is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. *He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession*" (Cardozo, J., writing for the unanimous court in *Clark v. Williard*, 294 U. S. at 214; italics ours).

In *United States v. Belmont*, *supra*, Stone, J., wrote: "New York would have been free to enforce a local policy subordinating the Soviet Government, as the successor of its national, to local suitors. Its judicial decisions indicate that such may be its policy for the protection of creditors or others claiming an interest in the sum due."¹⁵

Accordingly, had the Russian decrees provided for normal liquidation instead of confiscation, the title created by those decrees could not, if the New York courts held otherwise, impair the rights of foreign creditors legitimately pursuing their remedies in New York: *Clark v. Williard*, *supra*; *United States v. Belmont*, *supra*; *United States v. Bank of New York and Trust Co.*, quoted *supra*, p. 9; Barth

¹⁵Citing

James & Co. v. Second Russian Insurance Co., 239 N. Y. 248, 257;

Matter of People (City Equitable Fire Ins. Co.), 238 N. Y. 147, 152;

Matter of Waite, 99 N. Y. 433, 448;

Vladivostoksky Ry. Co. v. New York Trust Co., 263 N. Y. 369.

v. *Backus*, 140 N. Y. 230, 239, 240; *Security Trust Co. v. Dodd, Mead & Co.*, 173 U. S. 624, 629.¹⁶

C. The recognition of Soviet Russia did not affect the situation.

(1) With respect to the fund in question here, recognition could do no more than give the Soviet government the status of statutory successor of the First Russian Company. It could not increase the rights of a statutory successor as against a court with jurisdiction of the *res* concerning the distribution of the property among the creditors before it.

(2) Years before recognition, these ~~creditors~~ filed their claims. Not only that,—a state official had been directed to place property, under the jurisdiction and in the custody of the New York court, in a reserve fund, to be applied to the payment of those claims, principal and interest. Recognition could have no effect extraterritorially to divest property rights theretofore acquired in the State of New York. *Vladikavkazsky Ry. Co. v. New York Trust Co.*, 263 N. Y. at 378; *Guaranty Trust Co. v. United States*, 304 U. S. 140, 141; *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, *supra*.

A disinterested commentator has said: "So far as the writer is able to establish, not a single court of a major country has ever, *either before or after recognition of the Soviet*, reached the conclusion that a Soviet decree pur-

¹⁶In New York the rule is the same whether or not the foreign creditors enforcing their remedies in New York against the assets of a foreign corporation are of the same domicile as that of the corporation. *Hibernia Bank v. Lacombe*, *supra*, 84 N. Y. at 375; *Barth v. Backus*, *supra*, 140 N. Y. at 239. This rule is recognized as the prevailing American doctrine in *Security Trust Co. v. Dodd, Mead & Co.*, *supra*, 173 U. S. at 629.

Yermaloff and substantially all other creditors on behalf of whom this brief has been submitted, were, at the time their claims were filed, non-residents of Soviet Russia.

porting to confiscate private property could affect any property other than that within Soviet Russia at the time of confiscation"¹⁷ (*italics ours*).

D. What has been said applies with even greater force to those claimants who are merely awaiting payment of interest.

In 1931, when the Court of Appeals decreed that the claims should be paid, with interest, it was applying a New York statutory rule which allows interest as an incident to recovery upon amounts due for a breach of contract, whether liquidated or unliquidated. New York Civil Practice Act, § 480; *Preston Co. v. Funkhouser*, 261 N. Y. 140, 142, affirmed 290 U. S. 163. The award of interest is strictly a matter of state policy:¹⁸ *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487; *Funkhouser v. Preston Co.*, *supra*, 290 U. S. at 167.

The New York courts having, in pursuance of their settled doctrine, made a thoroughly appropriate decision as

¹⁷Borchard, *Confiscations, Extraterritorial and Domestic*, 31 American Journal of International Law 675 (1937).

The same principle—the territorial limitation of confiscatory power—was the basis of decision in *Compania Espanola v. Navemar*, 303 U. S. 68, 75, where attempted appropriation of a Spanish ship by the recognized government of Spain was denied effect in the Admiralty Courts of the United States because the ship had never been surrendered to the Spanish Government, nor actually seized by that Government in its own territorial waters.

Oetjen v. Central Leather Co., 246 U. S. 297, referred to on nine separate pages of the Government's brief, has no application. For, as has been frequently recognized, it dealt with property situated within the confiscating state at the time it was seized. And on this ground the case has been distinguished from cases involving the questions with which we are concerned. (See, for example, *U. S. v. Belmont*, minority concurring opinion, 301 U. S. at 333.)

¹⁸The federal courts also allow interest in federal liquidations. *American Iron Co. v. Seaboard Air Line*, 233 U. S. 261, 266, 267; *Consolidated Rock Products Co. v. DuBois*, 312 U. S. 510, 527. On the allowance of interest as an essential element of compensation, see *Miller v. Robinson*, 266 U. S. 243, 257-8.

to the distribution of property in their custody—by applying it to the payment of creditors' valid claims—their disposition of the *res* must be respected. This would be so even where the conflicting decrees are those of sister states—jurisdictions whose decrees are *entitled* to full faith and credit. *Clark v. Williard*, 294 U. S. at 213, 214. It is true, *a fortiori*, as to foreign countries whose decrees are allowed effect only as a matter of comity. *Moscow Fire Insurance Co. v. Bank of New York and Trust Co.*, 280 N. Y. at 311-14.

This ground of decision does not depend on any "state policy against confiscation" nor does it raise any conflict between Federal and State policy on that subject (Specifications of Error, 1-7; Petitioner's Brief, 12-13). Nor does it interfere with anything that the Soviet government has done within its jurisdiction. Applicable to this case is the language of Mr. Justice Stone referring to the facts before the Court in *United States v. Belmont*, 301 U. S. at 333: "There is no question here of re-examining the validity of acts of a foreign state and no question of the United States' declaring and enforcing a policy inconsistent with one that the State of New York might otherwise adopt in conformity to its own laws and the Constitution."

SECOND

The Litvinov assignment created no overriding Federal rights. It did not purport to impair, and did not in fact impair, the rights of these creditors.

A. The Litvinov assignment conveyed only such rights as the Soviet government itself could have successfully asserted in our courts.

1. The United States took only what Russia had to transfer. *United States v. Buford*, 3 Pet. 12, 30; *New Orleans v. United States*, 10 Pet. 662.¹⁹ It took subject to any "preexisting infirmities". *Guaranty Trust Co. v. United States*, *supra*, 304 U. S. at 142. As *Lehman, J.*, stated in the *Moscow* case, 280 N. Y. at 304: The United States "invokes the aid of the court only to enforce the rights of the Soviet Government, whatever they might be, which the United States has acquired by assignment, to property within this State and subject to the law of the State."

2. The assignment states what Russia transferred: "The amounts admitted to be due or that may be found to be due" to the Russian Government "as successor of prior governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations * * *" (R. 36a).

These general terms may include a variety of things: claims for money deposited here by the Imperial Russian Government or the Provisional Russian Government (*State of Russia v. National City Bank*, 69 Fed. [2d] 44; cf. *Guaranty Trust Co. v. United States*, 304 U. S. 126); judgments in tort or contract actions brought here by those govern-

¹⁹"The nature and legal effect of any contract, indeed, are not changed by its transfer to the United States" (*United States v. Nashville, etc., Ry. Co.*, 118 U. S. 120, 125).

ments (*Lehigh Valley R. Co. v. State of Russia*, 21 Fed. [2d] 396, c. d. 275 U. S. 571); claims that had arisen out of its own business transactions here before recognition (*Russian Republic v. Cibrario*, 235 N. Y. 255) and local funds of extinct Russian corporations against which no beneficial rights are asserted in our courts (*United States v. Belmont*, 301 U. S. 324).

3. Nothing in the language of the assignment discloses an intention to transfer to the United States any of the property situated in New York free from the preexisting claims to which that property had been subjected by the prior judicial acts of that State. As this Court has said of this assignment: "There is nothing in either document (the assignment of Litvinov and the acceptance by the President) to suggest that the United States was to acquire or exert any greater right than its transferor, or that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims, or that the United States, as assignee, is to do more than the Soviet Government could have done after diplomatic recognition—that is, collect the claims in conformity to local law" (*Guaranty Trust Co. v. United States*, 304 U. S. at 143).²⁰

So far as the language of the Litvinov assignment expressly touches the point, the indication is definitely the other way, for the Soviet Government agrees "not to make any claims with respect to . . . judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interest therein in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest" (R. 36a, 36b).

²⁰Where the United States intervenes to protect its interest in property administered by a court of equity "its rights must be adjudicated in recognition of the rights and demands of others interested in the same property." *United States v. Ansonia Brass Co.*, 218 U. S. 452, 472.

B. The Litvinov assignment and its acceptance did not set up an overriding federal policy.

1. Even if it were assumed that the Litvinov assignment and the paper accepting it could have provided for taking over this reserve fund in New York free and clear of the rights of creditors, quite obviously that was not done here.

(a) There was nothing, as we have seen, to show that the United States intended to enlarge whatever rights the Soviet Government had. There was none of the "conflict", "repugnance" or "irreconcilability" (*Hines v. Davidowitz*, 312 U. S. 52, 67) which is indispensable in showing that a treaty or federal law has overridden a state act. There is nothing, in short, to suggest that the United States, as assignee, could do more than "collect the claims in conformity to local law". *Guaranty Trust Co. v. United States*, quoted more fully, *supra*, page 17.

(b) Had the assignment contained language which would even have raised a doubt and thereby called for recourse to the principles of construction, the conclusion would be unchanged. For "even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them" (*Guaranty Trust Co. v. United States*, *supra*, 304 U. S. at 143; see also *Russian Volunteer Fleet v. United States*, 282 U. S. at 491, 492).

(c) These conclusions are in no wise affected by the decision in *United States v. Belmont*, *supra*, 301 U. S. 324. There the question was solely as to the sufficiency of a complaint which declared that the United States, under the Litvinov assignment, was entitled to money that had been placed on deposit with the defendant bankers by a Russian corporation. It did not appear that the bankers had any

interest in the matter "beyond that of a custodian" (p. 332). So far as the record disclosed, no creditors sought payment out of the deposit. The court did not pass upon—on the contrary, it specifically excluded—a situation in which the rights of creditors or other adverse claimants might be involved or impaired (p. 333):

"We do not consider the status of adverse claims, if there be any, of others not parties to this action. And nothing we have said is to be construed as foreclosing the assertion of any such claim to the fund involved, by intervention or other appropriate proceeding. We decide only that the complaint alleges facts sufficient to constitute a cause of action against the respondents (the bankers)."

(d) Government counsel say (Brief, 54):

"The controlling principle is that the Constitution forbids the states to take hostile action against a foreign power without the consent of the Federal government."²¹

No hostility to Russia is evinced by refusing to treat it more favorably than any other friendly country or than a sister state. There is nothing in the assignment to require that it be given any such preferential treatment. Certainly, there is nothing in the assignment to indicate that Russia could expect, or that the United States intended, that vested rights here in the United States would be destroyed or disregarded.

All that the United States agreed was to take what rights the Soviet Government had and to notify that Government of any sums "realized by the Government of the

²¹This is the same argument that was urged in the Government's brief in the Moscow case at 31, *et seq.*

United States" from the assignment to it of amounts that "*may be found to be due*" the Soviet Government. (Assignment, R. 36c, 36d; italics ours).

In the *Guaranty Trust Company* case, the United States made an argument similar to the one just quoted regarding the Litvinov assignment. The predecessor of the Soviet Government had made a deposit with the trust company. The trust company sought the protection of the Statute of Limitations. The United States contended (304 U. S. at 131) that "the statute is inoperative and ineffective since it conflicts with and impedes the execution of the Executive Agreement between the Soviet Government and the United States by which the assignment was effected." The court, noting that there was nothing in the Litvinov assignment or its acceptance to suggest "that the President by mere executive action purported or intended to alter or diminish the rights of the debtor with respect to any assigned claims", rejected the contention (at 136, 143).

2. If the Litvinov assignment had expressly stipulated what the Government contends it did, it would still not suffice to disturb the rights of these creditors, for they are vested rights of property (*Ettor v. Tacoma*, 228 U. S. 148, 156) which the Fifth Amendment protects against uncompensated destruction by the United States. *Meade v. United States*, 2 Ct. Cl. 224, 275; *Osborn v. Nicholson*, 13 Wall. 654, 662; *Lynch v. United States*, 292 U. S. 571, 579, 580; *Louisville Bank v. Radford*, 295 U. S. 555; 601-2.²²

The Fifth Amendment applies to friendly aliens as well as to citizens (*Russian Volunteer Fleet v. United States*, 282 U. S. 481, 489, 491-2).

²²In the *Belmont* case this Court held that on the record before it no question of the Fifth Amendment was presented, but it was careful to say: "It does not appear that respondents [the banker defendants who had set up the defense that the United States had no title] have any interest in the matter beyond that of a custodian. Thus far, no question under the Fifth Amendment is involved" (301 U. S. at p. 332, italics ours).

The President's mandate is "to exercise his executive power *under the Constitution*" (*Myers v. United States*, 272 U. S. 52, 123, italics ours). Neither he nor Congress can give validity to a treaty provision that attempts what the Constitution expressly forbids (*The Cherokee Tobacco*, 11 Wall. 616, 621; *Geofroy v. Riggs*, 133 U. S. 258, 267). "Certainly a treaty" made by the United States "could not divest rights of property already vested in (within) the State, even if the words of the treaty imported such an intention," said Chief Justice Taney in *Prevost v. Greneaux*, 60 U. S. 1, 7, holding that the succession of a person dying in 1848 could not be disturbed by a treaty made in 1853 although the right of succession was not asserted until after the treaty.

This Court has consistently refused to construe the Litvinov assignment as being intended to interfere with creditors' rights against assets in the United States. (*United States v. Bank of New York and Trust Co.*, 296 U. S. at 478-480; *United States v. Belmont*, 301 U. S. at 332-3, 335-7; *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624; 309 U. S. 697.) And even if the question were here a question *de novo*, the same result would be required by the settled preference for constructions that do not raise constitutional problems. "Even the language of a treaty whenever reasonably possible will be construed" so as not to destroy rights previously vested under State law (expressly stated, as the rule for construing the Litvinov assignment, in *Guaranty Trust Co. v. United States*, 304 U. S., at 143, quoted *supra*, p. 18; and illustrated by the decisions in *Prevost v. Greneaux*, *supra*; *New Orleans v. United States*, 10 Pet. at 731).

With the demonstration that no Federal right was created by the Litvinov assignment which could override the disposition made of this fund by the New York courts,

Petitioner's suggestion that it may wish to re-litigate the claims and re-examine their validity and amount (Brief, pp. 10-12; especially footnote 2) is to be disregarded as irrelevant. No such ground for continuing the action is asserted in the affidavit opposing dismissal (R. 50-1).

This blithe suggestion is made *in 1941*; after these claims have been examined, found to be valid,²³ and their validity affirmed (in 1937) by the New York Court of Appeals (274 N. Y. 545). Contrast the considered opinion of Cardozo, C. J., written *in 1931*, that "there would be manifest inequity if at this late date an ancillary receiver were to remit them"—these very creditors—"to their legal remedies and thus compel them to prove anew" (255 N. Y. at 423).

CONCLUSION

The writ should be dismissed, or the judgment affirmed, on the authority of *United States v. Bank of New York and Trust Co.*, 296 U. S. 463, 478-480; *United States v. Belmont*, 301 U. S. 324, 332-3, 335-7; *Guaranty Trust Co. v. United States*, 304 U. S. 140, 142-3; *United States v. Moscow Fire Insurance Co.*, 309 U. S. 624; 309 U. S. 697.

Respectfully submitted,

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Amicus Curiae

CARL S. STERN

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of Counsel

²³It is to be assumed that the highly experienced persons to whom the duty of adjudication has been confided by the State of New York have carried it out "with honor and capacity" (*Arkansas Commission v. Thompson*, 313 U. S. 132, 139).

APPENDIX

Order and Judgment on Remittitur Entered on the Decision of the Court of Appeals of the State of New York, 255 N. Y. 415. (From United States v. Pink, 296 U. S. 463—Record on Appeal, 37-42.)

AT a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 13th day of July, 1931.

Present—Hon. WILLIAM T. COLLINS, Justice.

[TITLE AS BELOW.]

A motion having been made for an order resettling the order herein, dated and entered June 16, 1931, upon the remittitur of the Court of Appeals,

NOW . . . (Recital of Moving Papers omitted) it is

ORDERED that the said order of June 16th, 1931 be and the same hereby is resettled so as to read as follows:

AT a Special Term Part I of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City of New York, on the 16th day of June, 1931.

Present—Hon. PHOENIX INGRAHAM, Justice.

In the Matter

of

The Application of THE PEOPLE OF THE STATE OF NEW YORK, by James A. Beha, Superintendent of Insurance of the State of New York, for an order to take possession of the property and conserve the assets for the benefit of the creditors of the

FIRST RUSSIAN INSURANCE COMPANY,
ESTABLISHED IN 1827,

and the interests of its policyholders, creditors, stockholders and the public.

ORDER ON REMITTITUR OF THE
COURT OF APPEALS.

The appellant First Russian Insurance Company Established in 1827, and the appellant G. Frank Dougherty and the appellant James A. Tillman, having appealed to the Court of Appeals from an order of the Appellate Division of the Supreme Court, First Department, dated May 29,

1930, and entered in the office of the Clerk of the said Appellate Division on June 11, 1930, which order modified and reversed in part and affirmed in part an order entered in the office of the Clerk of the County of New York on September 10, 1929, providing among other things, for the disposition of the surplus assets of the First Russian Insurance Company, Established in 1827, and said appeal having been argued at the Court of Appeals; and the Court of Appeals having on the 11th day of February, 1931, ordered, adjudged and decreed that the order of the Appellate Division of the Supreme Court so appealed from, as aforesaid, and the order of the Special Term of the Supreme Court entered as aforesaid on September 10, 1929, be reversed; that an order be entered dissolving the injunction contained in the order directing liquidation; and that the surplus assets of the First Russian Insurance Company established in 1827 be transferred in accordance with its opinion; and the said Court of Appeals having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court of the State of New York to be proceeded upon according to law.

NOW, on reading the remittitur of the Court of Appeals, filed herein on the 1st day of May, 1931, and on reading the said opinion of the Court of Appeals, and upon reading and filing the notice of motion herein dated May 1st, 1931, and the affidavits of Frederick B. Campbell, verified May 1, 1931, Marc D. Ratner, verified April 22, 1931, and of Michael J. Imchanitzky, verified April 29, 1931, and proof of the service thereof, the replying affidavit of Frederick B. Campbell, verified June 9, 1931, the answering affidavit of John M. Downes, verified June 2, 1931, the affidavits of Frederic C. Pitcher, verified May 25, 1931, and of Boris L. Komar, verified May 25, 1931 it is

ORDERED, ADJUDGED AND DECREED:

1. That the order and judgment of the Court of Appeals be, and the same hereby are made the order and judgment of this Court:

2. That the order of the Appellate Division of the Supreme Court for the First Department, dated May 29, 1930, and filed and entered on June 11, 1930, in the office of the Clerk of said Appellate Division, be, and the same hereby is reversed.

3. That the order of the Special Term of New York County, entered and filed in the office of the Clerk of the County of New York on the 10th day of September, 1929, be, and the same hereby is reversed.

4. That the injunction contained in the liquidation order herein dated and entered August 8, 1925, as resettled by order dated and entered September 11, 1925, be, and hereby is vacated and dissolved.

5. That the Superintendent of Insurance of the State of New York be and he is hereby permitted, authorized and directed to pay all claims of domestic creditors in full with interest which are determined and which have not heretofore been paid; and all expenses of liquidation.

6. That the Superintendent of Insurance be and he is hereby directed to ascertain, fix and determine as soon as possible the amounts of any and all lawful and valid claims heretofore filed herein on which attachments were obtained prior to the order directing liquidation in the above entitled proceedings and as to such of said claims or debts as are found valid to pay the same in full with interest.

7. That the Superintendent of Insurance be and he is hereby permitted, authorized and directed as soon as pos-

sible after the entry of this order to pay in full with interest all claims heretofore filed in this proceeding, which have been determined and found by the Referee heretofore appointed herein to be valid debts or obligations of the First Russian Insurance Company, Established in 1827 or of its United States Branch, regardless of the fact that some or all of such claims may be of foreign origin and might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class by the Superintendent of Insurance or by the said Referee.

8. That the Superintendent of Insurance be and he hereby is directed to ascertain, compute and report to this Court with his recommendations as soon as possible, the amount and validity of any and all other claims heretofore filed in this proceeding as to such of said claims as are found by him to be valid debts or obligations of the First Russian Insurance Company, Established in 1827, or of its United States Branch, to pay the same in full with interest, as and when directed by this court regardless of the fact that some or all of such claims may be of foreign origin and might have heretofore been classified as "foreign" claims or claims of the "second" or "third" class.*

9. The Superintendent of Insurance shall set aside and retain in his possession funds sufficient to pay all claims heretofore filed in full with interest; the funds so retained shall be known as the "reserve fund for filed claims."

10. In addition to the "reserve fund for filed claims," the Superintendent of Insurance shall set aside and retain

*Claims in connection with a United States branch of a Foreign insurance company were divided into three general classes: *First*, upon policies issued to residents or citizens by the United States branch; *second*, upon policies issued by the Company outside of the United States to persons residing within the United States; *third*, upon policies issued to non-residents of this country by foreign agencies of the insurance company. *Matter of People (Norske Lloyd Insurance Co.)*, 242 N. Y. 148, 155.

in his possession funds sufficient to pay; (1) all further reasonable expenses of liquidation; (2) all taxes which may then be due or become due to the Government of the United States and the State of New York; and the funds so set aside and retained shall be known as the "reserve fund for taxes and expenses of liquidation."

11. The surplus assets then remaining in the possession of the Superintendent of Insurance over and above the sums set aside and retained by him as and for the "reserve fund for filed claims" and the "réserve fund for taxes and expenses of liquidation," shall be known and described as the "accrued surplus fund" of the First Russian Insurance Company, Established in 1827 and its United States Branch, in the above entitled proceeding.

12. The "accrued surplus fund" as hereinabove defined and increment received thereon shall be held by the Superintendent of Insurance for a period of four months after the date of the entry of this order, for the purpose of and subject to attachment and/or execution by creditors or other persons, firms or corporations having claims against the First Russian Insurance Company, Established in 1827 or its United States Branch, which claims were not, prior to the date of the entry of this order, filed with the Superintendent of Insurance; and each and every creditor or other person, firm or corporation having or asserting such claims against the First Russian Insurance Company, Established in 1827, or its United States Branch, shall be permitted to maintain an action against said Company in the Courts of this State through levy of attachment or execution or otherwise against said "accrued surplus fund" in the manner provided by law.

13. After the expiration of the said period of four months after the entry of this order, the Superintendent of Insurance shall and he is hereby authorized and di-

rected to pay over to the First Russian Insurance Company, Established in 1827, as represented by a quorum of its board of directors, consisting of Leonid Davydoff, Count Alexandre Mordvinoff and Victor de Yermoloff, any balance of the said "accrued surplus fund" then remaining in his hands which has not been levied upon by virtue of warrant of attachment or execution.

14. The "reserve fund for filed claims" shall be held separate and apart from the "accrued surplus fund" and from any other funds or assets of the First Russian Insurance Company, Established in 1827 and its United States Branch, and said "reserve fund for filed claims" shall not be subject to levy by warrant of attachment or execution.

15. If any claim heretofore filed herein is disallowed and the disallowance thereof confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the amount set aside for the payment of such disallowed claims to the "accrued surplus fund" and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund."

16. If any claim heretofore filed is allowed in a reduced amount and the allowance in such reduced amount confirmed by a final order of the court, then the Superintendent of Insurance shall transfer the excess of the amount set aside for the payment thereof over and above the amount necessary to satisfy the claim in its then reduced amount to the "accrued surplus fund," and it shall thereupon become and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund".

17. After the final disposition of all claims heretofore filed herein either by payment thereof or by a final order

of the court confirming the disallowance thereof, the Superintendent of Insurance is authorized and directed to transfer to the "accrued surplus fund" any balance of said "reserve fund for filed claims" and any other funds or assets of the said Company then remaining in his hands after making reservation of funds sufficient to pay his proper charges and expenses; and said sums so transferred shall thereupon become part of the said "accrued surplus fund" and be held and disposed of in the manner herein provided for the disposition of the said "accrued surplus fund".

18. The Superintendent of Insurance is hereby directed to make and file within forty-five days from the date of this order an account of his proceedings as liquidator of the First Russian Insurance Company, Established in 1827 from March 7, 1929 down to the date of this order.

19. Any party to this proceeding may hereafter apply at the foot of this decree for such further relief as he may be advised.

Enter,

P. L.
J. S. C.

Enter

W. T. C.
J. S. C.